

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Southern New England Telephone Co.	)	
Petition for Declaratory Ruling and Order	)	
Preempting the Connecticut Department	)	WC Docket No. 04-30
Of Public Utility Control's Decision	)	
Directing the Southern New England	)	
Telephone Co. to Unbundle Its Hybrid	)	
Fiber Coaxial Facilities	)	

**OPPOSITION OF COVAD COMMUNICATIONS TO  
SBC CONNECTICUT REQUEST FOR  
DECLARATORY RULING AND PREEMPTION**

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## **I. Introduction**

Covad Communications, by its attorneys, herewith respectfully submits its opposition to the petition of the Southern New England Telephone Company (“SBC Connecticut”), for a declaratory ruling and order preempting a decision by the Connecticut Department of Public Utility Control (“DPUC”) requiring SBC Connecticut to unbundle access to its hybrid fiber-coaxial (“HFC”) network facilities in Connecticut. According to SBC Connecticut, the DPUC’s decision is inconsistent with the 1996 Act and implementing regulations.<sup>1</sup> For the reasons discussed below, SBC Connecticut is incorrect. The DPUC’s decision to unbundle HFC facilities is not inconsistent with the unbundling provisions in section 251 of the Act. Rather, as SBC Connecticut’s petition at several points implicitly concedes, the DPUC exercised its jurisdiction within a domain unrelated to the market-opening provisions of the 1996 Act, by creating open access to cable facilities.

Covad is the leading nationwide provider of broadband connectivity using digital subscriber line (DSL) technology. Covad’s nationwide facilities-based broadband network reaches nearly half of the nation’s homes and businesses. As a facilities-based provider, Covad relies on ILECs to provide unbundled transmission facilities (loops and interoffice transport) and the operations support systems (OSS) necessary to facilitate ordering and provisioning of such facilities. In addition, in order to connect customers to its network, Covad is collocated in hundreds of central offices throughout the nation. As a facilities-based provider of broadband services in both the mass market and enterprise markets, Covad unquestionably will be affected by SBC Connecticut’s request for a

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<sup>1</sup> See, e.g., SBC Petition at 2-3.

declaratory ruling that state commissions lack authority to implement market-opening laws and policies pursuant to state law. This is all the more so considering that the type of legal determination SBC Connecticut seeks from the Commission is entirely unnecessary in order to pursue the relief it seeks.

Notwithstanding SBC Connecticut's characterizations to the contrary, the DPUC's decision essentially orders open access to cable facilities – an area that, as SBC Connecticut's petition at times appears to concede, hardly falls within the scope and purpose of federal section 251 incumbent LEC unbundling obligations. Indeed, SBC Connecticut's petition seeks relief premised on a unique set of facts and circumstances – namely, an incumbent LEC that attempted to construct a cable TV system alongside its existing wireline local exchange network, abandoned its cable TV system build-out, and then sought to retire those facilities. Other incumbent LECs and state commissions are unlikely to ever encounter such unique facts and circumstances, which hardly go to the core of Title II section 251 obligations. Accordingly, Covad urges the Commission to avoid creating new law on the subject of federal preemption based on such a unique set of circumstances so far outside the ordinary scope of section 251 obligations. Rather, the Commission should reject and dismiss SBC Connecticut's petition.

## **II. The Facilities at Issue Are Likely Cable Facilities under Sec. 602(7) of the Act**

SBC Connecticut's petition itself concedes that the facilities at issue – hybrid fiber-coaxial cable designed and built to deliver cable television signals – were separate from and parallel to its common carrier network facilities.<sup>2</sup> As SBC Connecticut states, it

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<sup>2</sup> See SBC Petition at 5.

“never offered telecommunications services over the HFC facilities” in question.<sup>3</sup> In fact, the only use SBC Connecticut actually ever made of the facilities in question was to lease a portion of this network “to provide cable television service.”<sup>4</sup> Thus, SBC Connecticut never actually employed its HFC build-out to provide local exchange services, or to supplant the functions of its existing local exchange network. Indeed, it appears that SBC Connecticut never did more than contemplate using its HFC facilities to replace its local exchange network facilities, without ever seriously embarking on a program of doing so. Moreover, as SBC Connecticut acknowledges, at this point there is not even a remote possibility SBC Connecticut will actually begin using these abandoned HFC facilities to replace its local exchange network facilities.<sup>5</sup> Accordingly, at least at this juncture, the facilities in question cannot reasonably be construed to be part of SBC Connecticut’s local exchange network, a point even SBC Connecticut appears to concede.<sup>6</sup>

Instead, what appears more likely is that the facilities in question were actually a cable system under section 602(7) of the Act. Indeed, that section of the Act specifically anticipates the ownership and operation of cable systems by common carriers otherwise regulated under Title II. Specifically, section 602(7) states:

(7) the term “cable system” means a facility ... designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include ... (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of Title II of the Act, *except that such facility shall be considered a cable system (other than for the purposes of section 621(c)) to the extent such facility is used in the transmission*

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See SBC Petition, Ex. A at 14 (“Because the coaxial distribution facilities are not useful for telecommunications, the Company has removed and continues to dispose of them as conditions dictate.”)

<sup>6</sup> See SBC Petition at 3.

*of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services...*<sup>7</sup>

Here, there is no indication that SBC Connecticut's abandoned HFC facilities were ever used for any purpose other than for the transmission of video programming to multiple subscribers. Similarly, there is no indication that SBC Connecticut's HFC facilities were used "solely to provide interactive on-demand services." Accordingly, under this statutory language, there is a strong likelihood that the HFC facilities in question are actually a cable system, not to be confused with SBC Connecticut's continuing operation of an entirely separate local exchange network subject to section 251 unbundling obligations.

### **III. The Commission Should Reject SBC Connecticut's Attempts to Redefine "Network Element"**

In its Petition, rather than acknowledging openly that its HFC facilities in fact constitute a cable system, SBC Connecticut attempts to evade the DPUC's order by obfuscation. Specifically, SBC Connecticut seeks to have the Commission declare that its HFC facilities are not "network elements" under section 3 of the Act, by virtue of which they are not subject to unbundling. But in order to push the Commission to find that its HFC facilities are not "network elements," SBC Connecticut seeks to have the Commission redefine this statutory term. According to SBC Connecticut, its HFC facilities are not network elements because they have never been used, and are not readily capable of being used, in the provision of a telecommunications service.<sup>8</sup>

Of course, SBC Connecticut's re-definition of the term "network element" is wrong, and most importantly entirely unnecessary. Undoubtedly, the ILECs' obligations

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<sup>7</sup> 47 U.S.C. § 602(7).

<sup>8</sup> See SBC Petition at 2, 9.

to lease network elements to CLECs “for the provision of a telecommunications service” requires merely that the *CLECs* be using the facilities in question to provide telecommunications service, regardless of how the ILEC is making use of them. As even another ILEC, Qwest, has acknowledged,<sup>9</sup> it must be the CLEC’s, not the ILEC’s, use of the network element that is determinative of the right to unbundled access. “Network element” is defined by the Act to be a facility “used in the provision of a telecommunications service.”<sup>10</sup> Although the text of the definition is ambiguous on the matter of whose use of the facility matters, the Commission has previously made clear that a network facility meets the definition of a “network element” so long as it is “capable of being used” to provide a telecommunications service, rather than a facility currently being used to provide a telecommunications service.<sup>11</sup> Any other construction of the “network element” definition that hinged on the element being used currently to provide a telecommunications service – by the incumbent, of course, since absent unbundling no other party could access the facility – would be inconsistent with the network element unbundling provisions in section 251(c)(3).

Section 251(c)(3) of the statute is explicit that it is the *requesting carrier’s* intended use of the facility that triggers the unbundling obligation. Specifically, section 251(c)(3) provides that it is the ILEC’s “duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service” network

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<sup>9</sup> See Qwest Comments in WC Docket No. 01-338 at 21, 72-78.

<sup>10</sup> 47 U.S.C. § 153(29).

<sup>11</sup> See *UNE Remand Order* ¶ 329 (“[W]e interpret the term “used” in the definition of a network element to mean “capable of being used” in the provision of a telecommunications service.”) As explained further below, a definition of “network element” that hinged on the facility’s actually being used by the incumbent to provide telecommunications services would preclude competitors from ever accessing spare facilities, and provide the incumbents with a perpetual first-mover advantage.

elements.<sup>12</sup> The manner in which the elements are provided must allow “requesting carriers . . . to provide *such* telecommunications service.”<sup>13</sup> Plainly, the “telecommunications service” twice referenced in section 251(c)(3) is the *CLEC*’s telecommunications service. Nowhere in the text of section 251(c)(3) is the ILEC’s use of the facility to provide a telecommunications service even mentioned. Accordingly, the ILEC’s use of the facility is simply irrelevant to the inquiry of whether or not the facility must be unbundled. Since section 251(c)(3) is *unambiguous* in this regard, a plausible reading of the “network element” definition in section 153(29) is that it too, must be concerned with facilities that a *CLEC* could use to provide a telecommunications service.

On the contrary, any construction of the “network element” definition that required that a facility had to be used by the *incumbent* to provide a telecommunications service would run contrary to the Commission’s understanding of the purpose of the Act’s unbundling requirements: that competitors be allowed to fashion *their own* unique telecommunications services and information services using in part facilities leased by the incumbent, without regard to the uses the incumbent makes of those same facilities. The Commission found such differentiation of services provided over leased facilities to be one of the principal advantages to the Act’s unbundling requirements.<sup>14</sup> Indeed, the Commission’s construction of the network element definition based on the ILEC’s use of the network facility in question would lead to several absurd outcomes. Competitors would never be able to access unused facilities in the ILEC network plant because they were not being “used” by the incumbent. Moreover, competitors would only be able to

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<sup>12</sup> 47 U.S.C. § 251(c)(3).

<sup>13</sup> *Id.*

<sup>14</sup> See, e.g. *Local Competition Order* ¶ 333.

provide service to customers where the ILEC first used the same facility to provide service, giving the ILECs a perpetual first-mover advantage. (Thus, for example, Covad would never be able to obtain a spare loop to provide its stand-alone loop SDSL service.) It is precisely to avoid such absurd outcomes that the Commission rejected ILEC arguments that “because dark fiber is transport that is not currently ‘used’ in the provision of a telecommunications service, . . . it does not meet the statutory definition of a network element.”<sup>15</sup>

Thus, a network element is a network element regardless of whether an incumbent LEC has used it to provide telecommunications services or not – and regardless of whether SBC Connecticut happens to feel it is “readily” capable of being used to provide telecommunications services. (Certainly, a network element is a network element regardless of the expenses SBC Connecticut would incur in creating OSS to access it.<sup>16</sup> After all, for what else would OSS systems be created if not to access unbundled network elements?) A network element is a network element so long as a competitive carrier can use it to provide telecommunications services, and a competitive carrier may continue to access that network element so long as it continues to provide telecommunications services with that network element. This is exactly the understanding of the term “network element” the Commission reaffirmed in its *Triennial Review Order*,<sup>17</sup> a holding left untouched by the D.C. Circuit’s March 2 opinion on review of that Order.<sup>18</sup>

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<sup>15</sup> *UNE Remand Order* ¶326. *See also id.* at ¶¶ 327, 330.

<sup>16</sup> *See* SBC Petition at 16-17.

<sup>17</sup> *See Triennial Review Order* at paras. 58-60.

<sup>18</sup> *See USTA v. FCC*, Case No. 00-1012 (D.C. Cir. Mar. 2, 2004).



Of course, SBC Connecticut's obfuscations over the meaning of the term "network element" are entirely unnecessary, as it should well know. As explained above, SBC Connecticut's HFC facilities are "cable system" facilities under the Act, rather than part of its Connecticut local exchange network. SBC Connecticut's attempt to redefine "network element" is simply a part of its larger attempt to shoehorn its HFC cable facilities into section 251 of the Act, governing incumbent carriers' local exchange facilities – and thereby create an artificial case for federal preemption. As explained below, however, local open access regulations for cable facilities have little to do with the law or policy underlying the unbundling scheme in section 251 of the Act.

#### **IV. The Commission Should Similarly Reject SBC Connecticut's Artificial Limitation of Unbundling to Narrowband Services**

Strangely, SBC Connecticut takes the position that access to unbundled network elements is permitted solely for the offering of narrowband services by competitors.<sup>19</sup> In SBC Connecticut's upside-down view of the world, competitors have no legal right to access unbundled network elements unless they offer narrowband voice services, and may not access unbundled network elements to offer broadband services.<sup>20</sup> In other words, in SBC Connecticut's view of the world, Covad would simply not exist.

Of course, SBC Connecticut's view of the world – again, unnecessarily – runs directly contrary to the statutory language in the Act and the Commission's own rules and orders. Nowhere has the Commission stated that unbundled network elements must be used by competitors solely to provide narrowband local voice services. In fact, the

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<sup>19</sup> See SBC Petition at 3.

<sup>20</sup> See SBC Petition at 20-21.

Commission rejects that view in the *Triennial Review Order*.<sup>21</sup> There is simply no prohibition on competitors' access to unbundled network elements for the provision of broadband services – none. SBC Connecticut makes one up out of whole cloth, and then attempts to have the Commission enforce it as though it is actual law. The Commission was quite clear in the *Triennial Review Order*, in a section left undisturbed by the D.C. Circuit's recent opinion on review, that competitors may access unbundled network elements to provide so-called "qualifying services." The Commission specifically included access services, "such as xDSL and high-capacity circuits," as examples of qualifying services.<sup>22</sup> Moreover, the Commission concluded that, so long as a competitive carrier provides a qualifying service on a common-carrier basis, for example an access service such as xDSL, it could also provide alongside them *non-qualifying* services, such as information services, using the same network element.<sup>23</sup> SBC Connecticut's attempt to restrict the use of UNEs to narrowband voice services is entirely unsupported, and flies in the face of even the Commission's most recent holdings. Moreover, SBC Connecticut's attempt to restrict UNEs to narrowband services flies in the face of actual, everyday industry practice – such as Covad's entire business, which to date has consisted exclusively of using UNEs to provide broadband services.

Again, SBC Connecticut's attempt to cut out of whole cloth for all UNEs a brand new set of generally applicable use restrictions – to narrowband voice services – is simply unnecessary, except to further its attempt to shoehorn HFC cable facilities into section 251 of the Act. The Commission should reject SBC Connecticut's attempt to

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<sup>21</sup> See *Triennial Review Order* at para. 138, 140.

<sup>22</sup> See *Triennial Review Order* at para. 135.

<sup>23</sup> See *Triennial Review Order* at para. 143.

create an artificial case for federal preemption, by rejecting its artificial creation of narrowband use restrictions for UNEs.

**V. Section 251 of the Act Does Not Federally Preempt Local Regulations Requiring Open Access to Cable Facilities**

On the one hand, SBC Connecticut acknowledges that its HFC facilities (1) are not part of its local exchange network in Connecticut; (2) are not and have never been used to offer local exchange services in Connecticut; and (3) consist of an overlay network separate and apart from its local exchange network.<sup>24</sup> On the other hand, however, SBC Connecticut argues that section 251 of the federal Act, governing incumbent LEC local exchange networks, and this Commission's national rules implementing section 251 of the Act, should govern SBC Connecticut's concededly non-local-exchange-network HFC facilities. The Commission should not allow SBC Connecticut to have it both ways. SBC Connecticut is correct that its decommissioned HFC cable system is not part of its local exchange network in Connecticut – which is exactly why the DPUC's order is not preempted by section 251 of the federal Act and this Commission's national implementing rules.

The fact that SBC Connecticut's HFC cable facilities are, in its mind, “analogous” to the hybrid fiber-copper loop facilities the Commission addressed in the *Triennial Review Order* is irrelevant. SBC Connecticut quite clearly explains that its local exchange network subject to section 251, including any hybrid fiber-copper loop facilities, is wholly separate and apart from the decommissioned HFC cable facilities at issue here. According to the facts SBC Connecticut's petition puts forward, section 251 of the federal Act simply does not apply to such HFC facilities. Indeed, Covad is aware

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<sup>24</sup> See SBC Petition at 18.

of no other state where HFC cable facilities are available as UNEs under section 251 of the federal Act, nor is Covad aware of any other incumbent LECs that make such facilities available as UNEs. Rather, the facilities at issue here more closely resemble the HFC broadband facilities the Commission addressed in its *Cable Modem Declaratory Ruling*, currently on remand from the U.S. Court of Appeals for the 9<sup>th</sup> Circuit.<sup>25</sup> It appears that the issues SBC Connecticut raises are more appropriately addressed in that remand proceeding, rather than in any dockets implementing section 251.

Because the facilities at issue in SBC Connecticut's petition are cable facilities, there can be no federal preemption of the DPUC's order by virtue of section 251 of the federal Act and the Commission's national implementing rules. The DPUC's order can hardly be said to "substantially prevent implementation" of the Commission's Part 51 rules governing an entirely different set of local exchange network facilities. Moreover, the DPUC's order can hardly be said to require the unbundling of network elements "for which the Commission has either found no impairment ... or otherwise declined to require unbundling on a national basis."<sup>26</sup> The Commission has simply conducted no impairment analysis for HFC cable facilities. In the absence of any Commission rules or orders analyzing impairment for HFC cable facilities, the DPUC's order can hardly be said to conflict with any such rules or orders.

## **VI. Conclusion**

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<sup>25</sup> See *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9<sup>th</sup> Cir. 2003) (*remanding and vacating Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, CS Docket No. 02-52, GN Docket No. 00-185, 17 FCC Rcd. 4798 (2002)).

<sup>26</sup> See *Triennial Review Order*, para. 195.

SBC Connecticut's petition misconstrues the federal law governing UNE access in order to create artificial conflicts with a state order regulating facilities outside the scope of that federal law. In attempting to create such artificial conflict, SBC attempts to create an artificial case for preemption – in the hopes that the Commission will thereby create bad law. SBC Connecticut's petition, all claims of analogy notwithstanding, has nothing to do with unbundling access to the hybrid fiber copper loops in its local exchange network. Rather, SBC Connecticut's petition is about challenging a state order requiring open access to its cable facilities. The Commission should recognize SBC Connecticut's petition for what it is, and immediately reject and dismiss it.

Respectfully submitted,

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